TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905

No. 81.

CHARLES BOWN AND LEANDER L. ORMSBY, PLAINTIFFS IN ERROR,

vs.

ENOS C. WALLING.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

FILED JULY 21, 1905.

(19,851.)

(19,851.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 349.

CHARLES BOWN AND LEANDER L. ORMSBY, PLAINTIFFS IN ERROR,

vs.

ENOS C. WALLING.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

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1 UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable judges of the supreme court of the State of Idaho, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment in a suit which is in the supreme court of the State of Idaho, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit between Enos C. Walling, plaintiff, and Charles Bown and Leander L. Ormsby, defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears,

2 We being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at the city of Washington, D. C. and filed in the office of the clerk of the United States Supreme Court on or before sixty days from the date hereof, to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 22d day of June 1905.

Done in the city of Boise, with the seal of the circuit court of the United States for the district of Idaho, central division, attached.

[Seal United States Circuit Court, Idaho.]

A. L. RICHARDSON,
Clerk of the Circuit Court of the United States.

Allowed.

CHAS. O. STOCKSLAGER,
Chief Justice of the Supreme Court of the State of Idaho.

3 Return to Writ.

UNITED STATES OF AMERICA, } ss:
Supreme Court of Idaho, }

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceeding in the within entitled case with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of said supreme court, at Boise, Idaho, this 14th day of July, 1905.

[Seal of Supreme Court, State of Idaho.]

SOL. HASBROUCK,
Clerk of the Supreme Court of the State of Idaho.

Costs of Suit.

Plaintiff's costs, $5.00, paid by Enos C. Walling.
Defendants' costs, $17.75, paid by Charles Bown & L. L. Ormsby.
Costs of transcript, $30.00, paid by Charles Bown & L. L. Ormsby.

SOL. HASBROUCK,
Clerk of the Supreme Court, Idaho.

4 In the Supreme Court of the State of Idaho, December Term, 1903.

ENOS C. WALLING, Plaintiff and Respondent,
vs.
CHARLES BOWN and L. L. ORMSBY, Defendants and Appellants. } No. —.

Transcript.

On Appeal from the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Elmore.

Rice & Thompson, Wyman & Wyman, attorneys for appellants.
Daniel McLaughlin, attorney for respondent.

Filed —— —, 1903.
—— ——, Clerk.

5 Complaint.

In the Probate Court in and for Elmore County, State of Idaho.

ENOS C. WALLING, Plaintiff,
vs.
CHARLES BOWN and L. L. ORMSBY, a Co-partner, Defendants.

The plaintiff complains of the defendants and alleges:

I.

That at the time hereinafter mentioned the defendants were a co-partnership doing business as sheep men under the firm name of Ormsby and Bown.

II.

That during the time herein between the 15th day of April, 1902, and the 14th day of May, 1902, the defendants were the owners in possession of and by their agents and servants were in charge and care of certain animals, to wit: Sheep.

III.

That at divers times between mentioned dates said animals ran and grazed upon the land surrounding the plaintiff's dwelling house, within a two mile limit of said dwelling house. Contrary to the provisions of the R. S. of State of Idaho, sections Nos. 1210–11–12.

IV.

That at divers times between the above mentioned dates the said sheep had been herded by the agents and servants of the defendants within the said two mile limit and often approaching within
6 a few rods of the plaintiff's dwelling house. Contrary to the provisions of the R. S. of the State of Idaho of sections Nos. 1210–11–12.

V.

That by reason of the said sheep being herded within the said limit of the said dwelling house, the said sheep have eaten up, injured and destroyed the grass and verdu-e being and growing upon said land within said limit, thus depriving the plaintiff of said grass and verdu-e, being and growing upon said land within said limit, for his cattle and other stock, thus injuring the plaintiff thereby.

VI.

That in consequence of said animals so running, eating and destroying the said grass which was then and there upon said land in said limit, said plaintiff has been deprived of a stock and cattle range within said limit and has been damaged in the sum of $200.00.

VII.

Wherefore, the plaintiff prays judgment in the sum of $200.00 and costs in this action.

(Signed) DANIEL McLAUGHLIN,
Attorney for Plaintiff.

Filed in the probate court May 15, 1902.
Filed in the district court, Nov. 6th, 1902.

Demurrer.

(Title of Court and Cause.)

Comes now the defendants and demur to the plaintiff's complaint, and for ground of said demurrer, say:

7 1st. That said complaint does not state facts sufficient to constitute a cause of action against these defendants or either of them.

W. E. BORAH AND
E. M. WOLFE,
Attorneys for Defendants.

Filed in the probate court May 22, 1902.
Filed in the district court November 6th, 1902.

Answer.

(Title of Court and Cause.)

Comes now the defendants and for answer to the plaintiff's complaint admits, denies and alleges:

First. Admit the allegations in paragraph- one and two of said complaint.

Second. Deny that the sheep of the defendants have at any time or at all grazed or herded within a few rods of the dwelling of the plaintiff or any closer distance than one mile.

Third. Deny that the sheep of the defendants have at any time or at all injured or destroyed the grass or verdu-e growing about the residence of the plaintiff and within a distance of two miles other than such injury or destruction as arises by reason of the ordinary use of said land as commons for general grazing purposes as used by all other stock men. Denies that the defendants have in any manner or at all deprived the plaintiff of grass or verdu-e growing upon the lands on or about the premises of the plaintiff or within two miles of said premises, and denies that by reason of the grazing or herding of said sheep, or by reason of any act or acts upon the part of

8 the defendants, or in any manner or at all, the plaintiff has been injured.

Fourth. Deny that in consequence of said animals or sheep running upon or eating up or destroying said grass or by reason of their grazing upon said land within the limit of two miles or by reason of any act or acts upon the part of the defendants, or in any manner or at all, the plaintiff has been damaged in the sum of three hundred dollars or any sum whatever.

W. E. BORAH AND
E. M. WOLFE,
Attorneys for Defendants.

Duly verified.
Filed in the probate court May —, 1902.
Filed in the district court, November 6, 1902.

Judgment by the Court.

(Title of Court and Cause.)

This cause came on regularly for trial on the sixth day of June, 1902, Dan McLaughlin, Esq., appearing as counsel for plaintiff and E. M. Wolfe, Esq., for defendants. A trial by jury having been expressly waived by the respective parties, this cause was tried before the court, sitting without a jury, whereupon witnesses on the part of plaintiff, to wit: Enos C. Walling, George W. Goble and David A. Kenyon were called and examined on the part of the plaintiff, no witnesses called on the part of the defendants. The evidence being closed, the cause was submitted to the court for consideration and decision, and after due deliberation thereon, the court de-
9 livers its findings and decision and orders that judgment be entered herein.

Wherefore, by reason of the law and the evidence aforesaid, it is ordered, adjudged and decreed that Enos C. Walling, the plaintiff, do have and recover of and from Charles Bown and L. L. Ormsby the defendants the sum of $200.00 damage with interest on said sum at the rate of 7 per cent. per annum from the date hereof until paid, together with the said plaintiff's costs and disbursements incurred in this action amounting to sheriff fees $12.10, court fees $3.10, total cost $15.20.

Judgment rendered June 6th, 1902.

J. S. WHITE, Judge.

Filed in the probate court, June 6, 1902.
Filed in the district court, November 6, 1902.

Amended Answer.

In the District Court of the Fourth Judicial District of the State of Idaho in and for Elmore County.

ENOS WALLING, Plaintiff,
vs.
CHAS. BOWN and L. L. ORMSBY, Defendants.

Come now the defendants above named and to the plaintiff's complaint make answer as follows:

1. Defendants deny each and every allegation in plaintiff's complaint contained not hereinafter specifically admitted.

2. Defendants admit all the allegations of paragraphs one and two of plaintiff's complaint.

10 3. Defendants admit that during the times in said complaint mentioned plaintiff was the owner of the land therein

mentioned and was in and was entitled to the actual and exclusive possession thereof, and that the same is, and then was, the possessory claim of plaintiff. That said lands are described as follows, to wit: The north one-half of the southwest quarter of section fifteen and the southeast quarter of the northeast quarter and the northeast quarter of the southeast quarter of section sixteen in township 2 north of range seven east of Boise-meridian, in Elmore county, Idaho.

Defendants further admit that during all of said times plaintiff owned, had and lived in the dwelling house upon said lands.

4. That during all of said times plaintiff's said land was completely surrounded by unoccupied and unappropriated public lands belonging to the United States.

5. Defendants admit that at divers times between the 15th day of April, 1902, and the 14th day of May, 1902, the defendants' said sheep were herded and permitted to graze upon the unoccupied and unappropriated lands of the United States within two miles of the plaintiff's said dwelling house.

6. It is admitted that during said times above mentioned said sheep ate up grass upon the unoccupied and unappropriated public lands of the United States within two miles of the plaintiff's dwelling house.

7. Defendants admit that plaintiff is the owner of a herd of
11 cattle which range upon said unoccupied and unappropriated public lands of the United States within two miles of his said dwelling house, and that but for the action of plaintiff's sheep as herein stated, said cattle would have gotten and eaten said grass. That the grass so eaten by defendants' sheep as herein stated, is, and then was, of the value of two hundred dollars.

8. Defendants allege that the said sheep did not at any time enter, herd or feed upon any of the plaintiff's lands, but were at all times upon the unoccupied and unappropriated lands of the United States.

9. Defendants allege that their said sheep have not at any time or at all injured or destroyed the verdu-e growing upon the lands within two miles of the dwelling house upon plaintiff's said lands above mentioned, other than said injury or destruction was occasioned by reason of the ordinary use of said land as commons for general grazing purposes; and further defendants allege that said lands are ordinarily and commonly so used by all other stock men in that vicinity for grazing of all other kinds of live stock.

10. Defendants allege that said lands situated within two miles of the dwelling house upon plaintiff's said lands, are commonly and usually used, grazed and occupied by other kinds of stock than sheep in the same way and not in any other, than all other public public lands in that vicinity and were so used by defendants with their sheep at the times herein mentioned and in this action complained of.

12 Wherefore, defendants pray that they may have judgment for their costs.

WYMAN & WYMAN,
RICE & THOMPSON,
Attorneys for Defendants.

Filed in the district court, Nov. 7, 1902.

Judgment.

(Title of Court and Cause.)

Now on this 7th day of November, A. D. 1902, this cause came regularly on to be heard before the court, Daniel McLaughlin appeared for the plaintiff and Rice and Thompson and Wyman & Wyman appeared for the defendants. Whereupon, by leave of court, plaintiff amended his original complaint and the defendants filed an amended answer. Whereupon the plaintiff moved the court that the plaintiff do have and recover judgment against the defendants on the pleadings for the amount prayed for in the complaint The motion was submitted to the court, and after due consideration, the court being fully advised in the premises, the court granted plaintiff's said motion and ordered that judgment be so entered on the pleadings for the amount prayed for in the amended complaint.

Wherefore, in consideration of the premises, it is by the court ordered, considered and adjudged that the plaintiff Enos C. Walling, do have and recover of and from the defendants L. L. Ormsby and Charles Bown, the sum of two hundred dollars ($200.00) and
13 his costs taxed at the sum of eighteen and 35-100 dollars.

KIRTLAND I. PERKY,
District Judge.

Filed Nov. 7, 1902.
Entered Nov. 7, 1902.

Bill of Exceptions.

(Title of Court and Cause.)

Be it remembered that on this 7th day of November, A. D. 1902, the said cause being regularly on for hearing before the court, Daniel McLaughlin appearing for the plaintiff, and Rice & Thompson and Wyman & Wyman appearing for the defendants, the original complaint was amended and the amended answer was filed by leave of the court; whereupon the plaintiff moved that the plaintiff have and recover judgment against the defendants on the pleadings for the amount prayed for in the complaint.

The motion having been submitted to the court, after due consideration, the court granted plaintiff's said motion and ordered

judgment so entered on the pleadings for the amount prayed for in the amended complaint; to which order the defendants duly excepted.

And because the above and foregoing does not appear in the record but is proper to be incorporated in a bill of exceptions, the same is hereby settled and allowed as defendant's bill of exceptions herein, all parties to the action consenting thereto.

14

In open court November 7th, 1902.

KIRTLAND I. PERKY,
District Judge.

Filed Nov. 7th, 1902.

In the Supreme Court of the State of Idaho, May Term, A. D. 1903.

ENOS C. WALLING, Plaintiff and Respondent,
vs.
CHARLES BOWN ET AL., Defendants and Appellants.

On an Appeal from the District Court of the Fourth Judicial District in and for Elmore County.

This cause having been heretofore heard, submitted and taken under advisement by the court, and the court having fully considered the same, now on this day the cause was again called, and the decision of the court is delivered by Justice Ailshie to the effect that the judgment of the court below be reversed.

It is therefore considered, adjudged and decreed by the court, that the judgment of the district court of the fourth judicial district in and for the county of Elmore, in the above entitled cause be and the same hereby is reversed and the cause remanded to said district court for further proceeding in accord with the views expressed in the opinion filed in the cause. Costs are awarded to the appellants.

15

I, Sol Hasbrouck, clerk of the supreme court of the State of Idaho, do hereby certify, that the foregoing is a true copy of an original judgment entered in the above entitled cause, on the 11th day of June, A. D. 1903, and now remaining of record in my office.

Witness my hand and seal of the court, affixed at my office, this 11th day of June, A. D. 1903.

[SEAL.] SOL HASBROUCK, Clerk.

Amended Complaint.

(Title of Court and Cause.)

The plaintiff complains of the defendant and alleges:

That at the times hereinafter mentioned, the defendants were copartners doing business under the firm name of Ormsby and Bown.

That during the times hereinafter mentioned and for a long time prior thereto, the plaintiff was and now is the owner and lawfully in possession of the following described real estate situated in Elmore county, State of Idaho, to wit: The north one-half of the southwest quarter of section fifteen and the southeast quarter of the northeast quarter and the northeast quarter of the southeast quarter of section sixteen in township two north of range seven east of Boise-meridian, in said county and State.

That on the fifteenth day of April, 1902, and for a long time prior thereto and from said date to December, 1902, the plaintiff was residing in dwelling house owned by the above-named plain-
16 tiff situated upon the premises and lands of the plaintiff as hereinbefore in this complaint described, and that the plaintiff was during said time and is now the owner of about two hundred head of cattle that ranged near and around said above described premises.

That during the time aforesaid and between the fifteenth day of April, 1902, and the date of the commencing of this action the defendants were the owners of and in the possession of and chargeable with the care of one band of sheep consisting of from two to three thousand head.

That during the aforesaid times and between the 15th day of April, 1902, and the date of the commencing of this action the defendants and their servants, employees and agents carelessly, wrongfully and negligently permitted and allowed said sheep to graze within two miles of the dwelling house aforesaid of the said plaintiff and upon the Government lands around the premises of the plaintiff above described, contrary to the provisions of secs. 1210, 1211 of the Revised Statutes of Idaho.

That by reason of the unlawful, careless, wrongful and negligent act or acts of the said defendants and their employees, agents, and servants as aforesaid, unlawfully, carelessly, negligently, wrongfully and recklessly permitting and allowing said sheep owned by said defendant to graze within two miles of the dwelling house of the said plaintiff and upon the land surrounding the premises of said plaintiff mentioned as aforesaid said plaintiff has sus-
17 tained great damage, in that the grass and pasturage near and about plaintiff's premises and within two miles of said dwelling house of said plaintiff has been eaten and destroyed by said sheep belonging to the defendants, and the plaintiff's said cattle were thereby deprived of the grass and pasturage growing in and upon said lands which they otherwise would have pastured upon.

That said damages were entirely caused and occasioned by the unlawful, wrongful, act or acts, carelessness and negligence of the said defendants and their servants, employees and agents, and at the time and in the manner aforesaid.

That said damages sustained by the plaintiff as aforesaid were inflicted and ca used without fault and negligence on the part of said

plaintiff, who was at the said time, and in the manner aforesaid, exercising ordinary care and prudence.

That by reason of said injuries and damages to said plaintiff sustained as aforesaid, and in consequence thereof, said plaintiff has been injured in the sum of two hundred dollars.

Wherefore, plaintiff demands judgment against said defendants for the sum of two hundred dollars ($200) and for costs and disbursements incurred herein.

DANIEL McLAUGHLIN,
Attorney for Plaintiff.

Duly verified.
Filed October 29th, 1903.

Demurrer.

(Title of Court and Cause.)

18 Come now the defendants and demur to the plaintiff's amended complaint filed herein, on the following grounds, to wit:

1. That said amended complaint does not state facts sufficient to constitute a cause of action:

2. That said complaint does not state any cause of action other than a violation of sections 1210 and 1211 of the Revised Statutes of the State of Idaho, and said sections are in violation of article XIV. of the amendments of the Constitution of the United States, in that their effect is to deprive the defendants of their property without due process of law and that they deny to defendants the equal protection of the laws.

Wherefore, defendants pray that they be not required to plead further to plaintiff's amended complaint, and that they recover their costs.

WYMAN & WYMAN,
RICE & THOMPSON,
Attorneys for Defendants.

Filed October 29th, 1903.

Order Overruling Demurrer.

(Title of Court and Cause.)

In the case of Enos C. Walling *vs.* Charles Bown and L. L. Ormsby on the demurrer to the plaintiff's complaint, this court is precluded from entertaining any different view in regard to the validity of sections 1210 and 1211 of the Revised Statutes of this State, commonly known as the two mile limit law, from that heretofore expressed by the supreme court on appeals in similar cases.

19 This court is bound to follow the view expressed by the supreme court upon these two sections and the validity of the statute in regard to grazing sheep within two miles of a habi-

tation, and for that reason the demurrer in this case which seems substantially like the two cases already decided by the supreme court, must be, and it is overruled.

LYTTLETON PRICE, Judge.

Filed October 29, 1903.

Minutes of the Court.

MOUNTAIN HOME, IDAHO,
THURSDAY, Oct. 29th, 1903—10 o'clock a. m.

(Title of Court and Cause.)

This cause coming on to be heard on remititur from the supreme court, plaintiff filed amended complaint to which defendants filed demurrer which was argued and overruled as shown by order overruling filed this day, and defendants given forty-eight hours in which to answer complaint.

Whereupon the court adjourned until Friday, October the 30th, 1903, 10 o'clock a. m.

LYTTLETON PRICE,
District Judge.

(Minute Book No. 2, page 504.)

Judgment.

(Title of Court and Cause.)

Now on this 31st day of October, 1903, this cause came regularly on for hearing and Daniel McLaughlin appeared for the plaintiff but the defendants appear not; and it appeared to the court
20 that heretofore the said defendants had appeared herein and filed their demurrer to plaintiff's amended complaint and that on a previous day of this term of court said demurrer came regularly on for hearing and that upon such hearing the said demurrer was by the court after argument overruled to which ruling the said defendants then and there in due form excepted; and it further appeared to the court that said defendants were given forty-eight hours in which to answer but that hereafter they elected in open court to stand upon their said demurrer and it further appearing that the time for answer had expired and no answer had been filed, the default of said defendants and each of them was duly entered; whereupon in consideration of the premises and the law the court being duly advised in the same and upon motion of the plaintiff's attorney,

It is ordered, considered and adjudged that the plaintiff Enos Walling do have and recover of and from the said defendants Charles Bown and L. L. Ormsby judgment in the sum of two hun-

dred dollars and his costs of suit taxed in the sum of three and 90-100 dollars.

LYTTLETON PRICE,
District Judge.

In open court, Oct. 31, 1903.
(Filed October 31, 1903.)
Entered and recorded Nov. 4, 1903, at 2:15 p. m. Book 3, page 84.

21 Notice of Appeal.

(Title of Court and Cause.)

To Enos Walling, plaintiff; Daniel McLaughlin, attorney for said plaintiff, and to the clerk of the above entitled court:

You and each of you will please take notice that the defendants in the above entitled action hereby appeal to the supreme court of the State of Idaho, from the judgment therein entered in the said district court on the 4th day of November, 1903, in favor of the plaintiff in said action and against said defendants, and from the whole thereof.

WYMAN & WYMAN,
RICE & THOMPSON,
Attorneys for Defendants.

Service admitted by copy after filing this 20th day of November, 1903.

DANIEL McLAUGHLIN,
Attorney for Plaintiff.

Filed Nov. 20th, 1903.

Attorney's Certificate.

It is hereby stipulated by the undersigned, the attorneys of record for the respective parties hereto, that the foregoing transcript is correct, that it contains the judgment roll in the said action and that a good and sufficient undertaking in due form on appeal from the judgment entered on November 4, 1903, was filed herein on November 20, 1903.

RICE & THOMPSON,
WYMAN & WYMAN,
Appellant's Attorneys.
DANIEL McLAUGHLIN,
Respondent's Attorneys.

Service of the foregoing transcript admitted Nov. 28, 1903.

DANIEL McLAUGHLIN,
Respondent's Att'y.

22 In the Supreme Court of the State of Idaho.

ENOS C. WALLING, Plaintiff and Respondent,
vs.
CHARLES BOWN and L. L. ORMSBY, Defendants and Appellants.
} Petition for Rehearing.

Come now the appellants herein and move the court for a rehearing, said motion being based on the following grounds, to-wit: The sole question involved upon this appeal is the constitutionality of those sections of the statutes of this State which are commonly known as the two mile limit law, being sections 1210 and 1211 of the Revised Statutes of Idaho. Appellants, who were defendants below, in all their several pleadings to the complaint herein have claimed that the law in question is in conflict with and repugnant to the Federal Constitution in that it denies appellants the equal protection of the law and deprives them of their property without due process of law. In other words, they claim that they are not liable under the facts set forth in the complaint in this action by reason of the immunity or protection given them by the above clauses of the Federal Constitution.

The questions here referred to were the only ones presented to this court upon this appeal by the appellants and the decision and judgment of the court in effect deny the claim made by appellants.

We do not feel that we can add anything in the way of argument or citation to that which has already been presented to your honors and by you held insufficient and accordingly we shall not attempt any restatement of appellants' argument and contention but desire merely in this formal manner to call to the attention of the court

23 the fact that appellants in this case and in this court have claimed and do now claim the protection of the clauses of the Federal Constitution herein referred to and that the decision of the court has been to deny them their claim; and that there is in this action and upon this appeal drawn in question the validity of the statutes of the State of Idaho herein referred to on the ground of their being repugnant to the Constitution of the United States and that the decision of this court in this case and upon this appeal is in favor of their validity.

We therefore ask that your honors grant herein a rehearing.

Respectfully submitted,

RICE & THOMPSON,
WYMAN & WYMAN,
Att'ys for Appellants and Petitioners.

Endorsed: Petition for rehearing. Filed March 12, 1904. Sol Hasbrouck, clerk.

24 Record Entries.

BOISE, IDAHO, January 11, 1904.

SUPREME COURT, State of Idaho, } ss:

Court met pursuant to adjournment.

Present: Hon. Isaac N. Sullivan, chief justice, Hon. Charles O. Stockslager, justice, Hon. James F. Ailshie, justice, and the officers of the court, when the following, among other proceedings were had, to-wit:

ENOS C. WALLING, Respondent,
vs.
CHARLES BOWN ET AL., Appellants. } No. 910.

Ordered: That this cause is set for hearing on January 14th, 1904.

January 12th, 1904, same cause, the following entry was made, to-wit: Upon request of attorneys this cause is reset for hearing on January 29th, 1904.

On January 29th, the following entry was made in said cause: This cause having been set for hearing on this day the same was called. John C. Rice and Frank T. Wyman appeared for appellants, and James H. Hawley for the respondent. After argument by said attorneys the cause was submitted and by the court ordered under advisement.

February 16, 1904, the following entry was made in said cause. This cause having been heretofore heard, submitted and taken under advisement by the court, and the court having fully considered the same, now on this day the cause was again called, and the decision of the court is delivered by Justice Ailshie to the
25 effect that the judgment of the court below be affirmed.

It is therefore considered, adjudged and decreed by the court that the judgment of the district court of the fourth judicial district in and for the county of Elmore, in the above entitled cause, be and the same hereby is affirmed. Costs are awarded to the respondent.

APRIL 21ST, 1904.

The following entry was entered, to-wit: a petition for a rehearing of this cause having been heretofore filed, and the court having fully considered the same, now on this day the court delivered its decision to the effect that the petition be denied.

It is therefore, considered, adjudged and decreed by the court that the petition of appllants for a rehearing of this cause be, and the same is hereby denied.

Justice Stockslager dissents from said order.

26 In the Supreme Court of the State of Idaho, December Term, 1903.

ENOS C. WALLING, Respondent,
vs.
CHARLES BOWN and L. L. ORMSBY, Appellants.

Filed Feb. 29th, 1904. Sol. Hasbrouck, Clerk.

Stare Decisis.

1. When the beneficial results to be obtained by a departure from the construction and interpretation placed by this court upon a constitutional or statutory provision will not greatly exceed the disastrous and evil effects likely to flow therefrom, the court will decline to reopen those questions where rights and interests have become settled under such decisions and they have been acquiesced in by the legislature and the people for any reasonable period of time. (Syllabus by the court.)

Appeal from District Court in and for Elmore County; Hon. Lyttleton Price, Judge.

Action by plaintiff for statutory damages. Judgment for plaintiff and defendants appeal. Affirmed.

Rice & Thompson and Wyman & Wyman for appellants.

Daniel McLaughlin and Hawley & Puckett for respondent.

27 AILSHIE, *J.*:

This case was here for consideration once before (Walling *v.* Bown, 72 Pac. 960), and was remanded for further proceedings in accordance with the views there expressed. After the remittitur was sent down the plaintiff was allowed to file an amended complaint to which the defendants demurred. The demurrer was overruled and defendants failed to answer or make any further appearance, and such further proceedings were had on the part of the plaintiff, that, thereafter, a judgment was duly entered in favor of plaintiff. Defendants have appealed from the judgment which brings up the judgment roll alone for our consideration. The transcript apparently contains a history of the case from its inception in the justice's court, but the only matters properly here for our consideration are: the amended complaint, demurrer, order overruling demurrer and judgment. (Sec. 4456, R. S.) The record contains no certificate under sections 4819 and 4821, showing that any other papers were used on the hearing in the trial court. The question raised by the appeal is the constitutionality of sections 1210 and 1211, of the Revised Statutes, commonly known in this State as the "Two mile limit law."

Appellants in their brief say: "The facts of the case were fully understood and admitted by all the parties to the record. There never has been at any time any dispute as to what the evidence shows. The question has always been exclusively one of law * * * It will be seen that the admitted facts bring this action strictly within the terms of the statute."

Respondent refers to this statement contained in appellants' brief and affirms and reiterates it, and, in answer to the questions raised, cites: Seifers *v.* Johnson, 7 Idaho, 798; 65 Pac. 709 and Sweet *v.* Ballentine, 69 Pac. 995, both from this court, contending that these decisions have become the law of the State on the subject matter treated therein.

The issues, therefore, discussed by the respective parties on this appeal are these: Appellants urge the unconstitutionality of the two sections of the statute. Respondent relies on the doctrine
28 *stare decisis*. The latter proposition demands our attention first, and if applicable here, precludes our consideration of the former.

It is well enough to say here and now that while the personnel of this court has changed since the decisions above cited were announced, the principles of law have not changed, and we shall endeavor to apply them as they appear to us.

Now to our first inquiry. The doctrine of *stare decisis* is founded largely upon expediency and sound principles of public policy. (23 A. & E. Ency. of Law, 1st ed. 24.) It seems to be generally conceded that where the beneficial results to be obtained by a departure from the construction and interpretation placed by a court of last resort upon a constitutional or statutory provision will not greatly exceed the disastrous and evil effects likely to flow therefrom, courts should refuse to reopen such questions. This is the position which was taken by our supreme court in People *v.* Alturas County, 6 Idaho, 418; 55 Pac. 1067, where it was said in reference to a former decision holding a legislative act valid: "No good would be accomplished by overruling that decision, but much evil and confusion would result therefrom. Whether that decision was right or not, public policy and sound legal principle demand that we now adhere to it, and regard that question as a sealed book, which is no longer open to public scrutiny."

The reasons for this rule are illustrated in a practical way by the supreme court of Wisconsin in Fisher *v.* Horican Iron & Man'f'g Co., 10 Wis. 355, where it is said: "It is the duty of this branch of the government to pass finally upon the construction of a law, and determine whether the legislature in its action has transcended its constitutional limits, and the community has a right to expect, with confidence, we will adhere to decisions made after full argument and upon due consideration. The members of the court may change totally ever- six years, and if each change in the organization produces a change in the decisions, and a different construction of laws,

under which important rights and interests have become
29 vested, it is easy to see that the consequences will be most pernicious."

Following these reasons for invoking the rule here, let us examine the conditions now confronting us and determine whether, under the recognized and established rules of law, we would be justified in opening the question as to the constitutionality of these statutes for an original investigation and determination.

Sections 1210 and 1211 have been on the statute books of the Territory and State of Idaho since 1875. In June, 1901, they were construed and held constitutional by this court in Seifers *v.* Johnson, *supra.* In June, 1902, they were again considered and held valid and enforceable by the same court in Sweet *v.* Ballentine. In August, 1902, both political parties of the State met in conventions and each officially declared in favor of the law as construed by the court and pledged themselves to maintain the same on the statute books. Notwithstanding the declaration of both parties, the fight was carried into the campaign of the autumn of 1902, each party accusing the other of insincerity and juggling with the question. It became the burning an- paramount issue of that campaign. The legislature met in January, 1903, and remained in session sixty days, but no attempt was made to repeal or modify this law. On the other hand, bills were introduced, but never enacted, making it a penal offense to violate the existing law on the subject. These facts are a part of the public history of this State. During this period of more than two years and a half the various and respective interests and rights of settlers on the one hand and sheep owners on the other, as between themselves, have become fixed and settled, and conflicts and violence have ceased among them. To disturb this condition would be to invite recurrent strife, dangerous conflicts and endless confusion and discord among our citizens and alarm large industrial interests of the State without a single, apparent, good or beneficial result. The constitutional questions raised in this case were fully and ably presented in each of the former cases and seem to have
30 been elaborately considered by the court in the opinions. The issue made by appellants in this case is fully and clearly covered by those cases.

The writer of this opinion is of the belief that, whatever might be our judgment now, we would be wholly unjustified in opening these questions for further consideration by this court. If this subject is to again become the bone of contention in Idaho, it will have to come through either the legislature or a higher judicial tribunal than this.

Judgment affirmed with costs to respondent.

Sullivan, C. J. concurs.
Stockslager, J. dissents.

31 STOCKSLAGER, J. (dissenting):

I am unable to concur in the conclusion reached in this case. My associates state the two propositions presented by counsel for respective parties and decide the case on the doctrine of *stare decisis*. It is evident from the brief of appellant's counsel that they were anxious to have a decision on the constitutionality of the two sections of our statute in question in this case, from this court, as it is now constituted. It is equally evident from the brief of counsel for respondent that they were content with the former ruling of the court on the constitutional question, hence invoke the doctrine of *stare decisis*.

Having expressed my views in a former decision of this court as to the constitutionality of the law in question (Sweet *v.* Ballentine, 69 Pac. 995), I will only discuss the application of the doctrine of *stare decisis* as applied to the case at bar by my associates. I have no quarrel with the opinion as to the application of the doctrine of *stare decisis* in cases where property rights have attached or grown up under some existing law that has been declared valid by a court of last resort.

An examination of the former decisions of this court will disclose that when this question has been presented it has upheld the rule as above announced. In the case of People *v.* Alturas County, quoted approvingly by my associates in the majority opinion written by Mr. Justice Quarles as late as 1899, gives the reason why the former judgment of the court should not be disturbed: "It will thus be seen that more than two years ago this court held said act to be constitutional. Since then the people of these two counties, doubtless relying on the judgment of both the legislative and judicial branches of Government, have acted on the theory that said act was valid; and the former decision of the court having been acted upon by the people who have adjusted the business matters of the county, funded old indebtedness, and created new, should not be disturbed at this late day." Then follows the quotation from this decision in the majority opinion. Under the facts
in that case I think the writer very clearly and forcea-
32 announced the doctrine urged by counsel for respondent, and I am in full sympathy and accord with it. In that case the counties of Blaine and Lincoln had been organized out of the territory theretofore comprising Alta and Logan, and formerly Alturas county. Officers had been appointed and afterward elected for the new counties. The courts had been organized and recognized the new counties as political divisions of the State. New records had been procured for the two new counties and the old records transcribed into the new. All of the old indebtedness had been adjusted, new bonds issued and passed into the hands of innocent purchasers. Well it may be said that much confusion would follow the action of the court in disturbing conditions existing at the time of the attack on the former judgment of the court.

The case of Fisher *v.* Horicon Iron Mfg. Co. 10 Wis. 355, an extract from which appears in the majority opinion, is in harmony with the views expressed in People *v.* Alturas County. The syllabus in this case shows what question was before the court and the reason for the application of the rule announced in the opinion quoted by my associates: "When the supreme court of the State had decided that the 'act covering mills and mill dams' was constitutional, and right and interests have grown up and become vested under the law as then construed by the court, the court will now adhere to that ruling although all its members may be of opinion, if it were a new question, that the decision should have been against the constitutionality of the act." The fact that property rights had grown up under a former decision of the court seems to be the control-ing principle and the reason for adopting the rule of *stare decisis*.

In the 23rd A. & E. Ency. of Law, 1st ed. 24, referred to in the majority opinion, I quote the entire section, to-wit:

"4. Single decision and decision in series.—While a number of decisions seemingly corroborative of a previous one add strength to it and make it the more difficult to overrule or reverse it, mere numbers of cases upon the issue will not make the decision conclusive. Much more depends upon the opinion of the court and the emphasis placed upon the decision than upon the fact that any case
33 has been followed subsequently. For a variety of reasons, several cases similarly decided are stronger than one. There is less likelihood of error; any points, decisions, or statutes overlooked in the one may be considered in subsequent cases; and the case of reversing one decision is greater than the overthrow of a series. If there is but one case upon a point, and there seems no good reason for a reversal, that will ordinarily be taken as a fixed precedent. It is where there is a conflict of opinions or an evident error in the decision that a court will overrule one case, when it would hesitate more about condemning several. Much depends upon the importance of the decision and the weight to be attached to it. Whether the court is emphatic in its approval, whether the decision is one affecting or changing important interests, and whether it is expedient or good policy to sustain or overrule a particular decision, are questions which have much influence upon the court." It will be seen that the author, as in all the cases cited so far, ends his section with the announcement "whether the decision is one affecting or changing important interests." Note 1 to this section referring to Morse *v.* Goold, 11 N. Y. 285; 62 Am. Dec. 103, is as follows: "The effect of such judgment of affirmance rendered by a divided court is as conclusive upon the rights of the parties to the judgment as any other, although it is not considered as settling the question of law as to cases which may arise between other parties." Etting *v.* Bank of U. S., 11 Wheat. (U. S.) 59, furnishes some very instructive reading. It is an opinion by Chief Justice Marshall and is referred to by the author in his note 1 above referred to. These are the authorities

referred to in the majority opinion, and I assume are the foundation for the judgment.

I will now take up the other view of the situation as presented by the case at bar. In the 23rd A. & E. Ency. of Law, 1st ed. 36, under the head of "Limitations of the rule," the author says: "There are
certain limitations to this as to almost all rules. There are
34 clear and palpable mistakes of law which should be corrected,
especially when it can be done without injury to any person or property. If no injury or injustice would result to anyone, and a future and permanent benefit would undoubtedly result, the correction should be made at once. No prior decision is to be reversed without good and sufficient cause, yet the rule is not in any sense iron-clad, and future and permanent good to the public is to be considered rather than any particular case or interest. Even if the decision affects real-estate interests and titles, there may be cases where it is plainly the duty of the court to interfere and overrule a bad decision. Precedent should not have an overwhelming or despotic influence in shaping legal decisions. No elementary or well settled principle of law can be violated by any decision for any length of time. The benefit to the public in the future is of greater moment than any incorrect decision in the past. Whenever a correction can be made without working more harm than good, it should be done."

In Hart *v.* Burnett, 15 Cal., beginning at page 530 and ending at page 631, a very exhaustive opinion as well as instructive, at page 602, we find this significant language quoted from Chancellor Kent: "But I do not wish to be understood to press too strongly the doctrine of *stare decisis* when I recollect that there are more than one thousand cases to be pointed out in the English and American books of reports which have been overruled, doubted, or limited in their application. It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear and reversed without reluctance, rather than have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of the error."

Again it is said: "Even a series of decisions is not always conclusive evidence of what is law; and the revision of a decision very often resolves itself into a mere question of expediency, depending
upon the consideration of the importance of certainty in the
35 rule, and the extent of property to be affected by a change of it."

This case cites with approval the 25th Ala., 201, in the following language: "A series of decisions made and followed up from the earliest judicial times is binding upon the judges, but says that if those decisions be opposed to the State or Federal Constitutions, they would take pleasure in discarding them."

In Houghton *v.* Austin, 47 Cal. 646, we find another long, instructive case on the question at bar, and approves the case of Hart *v.*

Burnett *et al.*; at page 668, we quote: "The question of the conclusiveness of adjudications is not necessarily dependent upon the number of them. * * * We must give force to the qualifications expressed in the words 'settled,' 'acquiesced in,' and the like. They cannot mean 'settled' by the mere fact of the adjudications, for then there would be no use in the terms; they would be without meaning, for every judgment on a title would, on this construction, settle the law. * * * The rule itself implies that the doctrine protected by *stare decisis* cannot stand of itself. But it is a solecism to say that causes should be tried upon wrong principles—be decided against law—whether it be for the purpose of justice or not, so to decide them. The law is not so false to itself as to require its own permanent overthrow, unless the subversion be necessary to the public interests; and whether it be so necessary in a given case, is for the court, as a matter of legal discretion, whenever the rule is invoked. No such rule ever existed as that a court should be absolutely bound by a previous decision. And it would be especially dangerous to apply this inexorable standard to questions decisive of the constitutional rights of the citizen. One provision of the Constitution can impose no greater obligation than another. It may be that some time in the far distant future, a plain provision of the organic law may be temporarily lost sight of in the heat of a popular excitement. * * * There may be those who assume that the judges of this court are utterly ignorant of the spirit of the times in which we live; but we are willing to believe we have reached the condition of 'progress,' when it is supposed by persons, however in-
36 fluential, that judges are to be driven from carrying into judgment their conscientious convictions of what the law demands, by suggestions of public hostility, encouraged, perhaps, by those who affect to regret that the courts should place themselves in opposition to the prevailing sentiment. We are by no means convinced, however, that the people feel the intense affection for the sections of the Code which the parent entertains for his own bantling. There is a certain regard for the democratic idea which underlies all our institutions which the mere demagogue always fails to appreciate. It is based on the firm conviction that the masses of the people will ultimately understand that the violation of a constitutional privilege in the person of the humblest citizen, is a greater evil than any inconvenience which may be supposed to exist under the Government the people have solemnly adopted."

Again, in San Francisco *v.* Spring Valley W. W., 48 Cal. 493, we find this statement in the syllabus: "*Stare dicisis.*—Even if property rights have grown up under an erroneous decision with regard to the construction of a clause in the Constitution, it is better that inconvenience should be submitted to, rather than such a decision should stand, and a valuable provision in the fundamental law be obliterated."

In *Ex parte* Koser, 60 Cal. 177, at page 204, in discussing the application of the rule of *stare decisis*, the court say:

"Nor can the doctrine *stare decisis* be invoked to prevent us from inquiring into the constitutionality of the sections of the penal code. If, in *Ex parte* Andrews the act of 1858 was decided to be valid, in *Ex parte* Newman (9 Cal. 502), the same act was declared to be in conflict with the fourth section of the first article of the former constitution. In holding the sections of the penal code to be obnoxious to constitutional objection, we but return to the rule which, for more than three years, was the established rule in California. But if the case *Ex parte* Andrews stood alone—'No such rule ever existed as that a court should be absolutely bound by a previous decision.

37 And it would be especially dangerous to apply this inexorable standard to questions decisive of the constitutional right of the citizen.' (Houghton *v.* Austin, 47 Cal. 666.)

The supreme court of Texas in a very elaborate and well considered opinion (Willis *v.* Owen, 43–41,) on page- 43–49, speaks in no uncertain terms as to the application of the doctrine of *stare decisis*: "This doctrine grows out of the necessity for a uniform and settled rule of property, and definite basis for contracts and business transactions. If a decision is wrong, it is only when it has been so long the rule of action, as that time and its continued application as the rule of right between parties demands the sanction of its error. Because, when a decision has been recognized as the law of property, and conflicting demands have been adjusted, and contracts have been made with reference to and on faith of it, greater injustice would be done to individuals, and more injury result to society by a reversal of such decision, though erroneous, than to follow and observe it. But when a decision is not of this character, upon no sound principle do we feel at liberty to perpetuate an error, into which either our predecessors or ourselves may have unadvisedly fallen, merely upon the ground of such erroneous decision having been previously rendered. The questions to be considered in these cases have no application whatever to the title or transfer of property, or to matters of contract. They involve the construction and interpretation of the organic law, and present for consideration the structure of the Government, the limitation upon legislative and executive power, as safeguards against tyranny and oppression. Certainly, it cannot be seriously insisted that questions of this character can be disposed of by the doctrine of *stare decisis*."

This court in a very recent decision, published July 1st, 1903, written by Mr. Chief Justice Sullivan, and concurred in by Mr. Justice Ailshie (the writer took no part in the decision for the reason that the rights of the parties had been litigated before him while

38 sitting as a district judge), laid down the rule for the application of the doctrine of *stare decisis*. This being my first opportunity to express my views on the question that was at issue in that cause—Parke *v.* Boulware, 73 Pac. 19,—I now give it my full and unqualified approval. The facts as stated by the court were as follows: "This action was brought to recover $500.00 dam-

ages for an alleged wrongful destruction of certain dams alleged to have been situated in appellant's irrogating ditch, by means of which appellant raised water out of his said ditch onto his land for irrigating purposes, and also for a perpetual injunction restraining respondent from interfering with said dams and ditches or of the flow of the water therein. The defendants (who are respondents here) answered and denied that appellant or his predecessors in interest constructed the water channel claimed by him as a ditch and averred that the same is one of the natural channels of Cassia creek, through which water has from time beyond the memory of man ever flowed, and that said channel was known as the North fork or Cassia creek; that said channel had been used by respondents and their predecessors in interest for more than twenty years from Cassia creek to and upon their lands, and averred that the use of said channel by appellants had been in common with that of respondents; and denied that they had cut away and removed said dams or that they threatened to remove the same." The case was tried in the lower court, judgment entered, and appeal taken to this court, and on hearing reversed; another trial was had below judgment entered; another appeal taken, and upon the hearing the doctrine of *stare decisis* was sought to be invoked. The court said: "The doctrine of *stare decisis* is not applicable to this case. We cannot regard that rule as showing any application to this case. That rule or doctrine grew out of the necessity for a uniform and settled rule of property, and to form a definite basis for contracts and business transactions."

It would seem from all the authorities bearing on the question of the application of the doctrine of *stare decisis* that if property rights have grown up or have been settled under an existing de-
39 cision of the court of last resort, the judgment will usually be upheld. This is certainly the correct rule;—has been twice so declared by this court, and if it is shown in the case at bar that such a condition exists, then it should prevail here.

Are the reasons for the application of this rule sufficient? What property rights have grown up under these two sections of the statute? Does the fact that they have remained on the statute books since 1875 make them valid or give them special meaning; or is it because they were permitted to repose for a term of twenty-seven years before anyone attempted to enforce them that they are to be given new meaning or special vitality? Does the fact that the two political parties were seeking for an advantage give these sections force and validity? Does the fact that the legislature met in 1903 and did not repeal or modify this law give it additional strength; or is their silence on the subject to be so construed that the doctrine of *stare decisis* must be invoked and a new rule for the application of the doctrine established by this court? Does the fact that "bills were introduced making it a penal offense to violate the existing law on the subject" add force to the law or change the doctrine of *stare decisis?* It is true, as stated in the majority opinion, that "these facts are a part of the public history of the State," but does that add

force and validity to the law, or does it change the doctrine of *stare decisis?* If property rights have been settled or grown up since this law was first declared constitutional by a divided court in June, 1901, then there is some reason for the application of the rule invoked by my associates in the majority opinion. Did any one ever hear of the Government permitting property rights to attach to the public domain, excepting by proper entry under the land laws of the United States? It is as much a matter of public history that the Government will not permit an individual to fence the public domain and thus withdraw it from the use and benefit of the public as is the actions of the political parties in attempting to juggle with a statute and thus acquire a political advantage.

40 The constitutional rights of the people cannot be disposed of in this way, nor can the doctrine of *stare decisis* be invoked to accommodate the whims or caprices of either or both parties.

I cannot concur in the statement in the majority opinion as to the "respective rights and interests of settlers on the one hand and sheep owners on the other, as between themselves, have become fixed and settled." The court records show that a vast number of suits have arisen, three of them finding their way to this court. The dangerous conflicts we have had in this State have not been between the settlers and stock men, but between conflicting stock interests.

For the foregoing reasons, based on the decisions of all the courts, including the only two expressions of our own court, I do not believe the doctrine of *stare decisis* should control, and that appellants were entitled to a decision on the merits of the case.

41 In the Supreme Court of the State of Idaho.

CHARLES BOWN and LEANDER L. ORMSBY, Plaintiffs in Error, vs. ENOS C. WALLING, Defendant in Error. } Petition for Writ of Error.

Filed June 22d, 1905. Sol. Hasbrouck, Clerk.

Your petitioners, Charles Bown and Leander L. Ormsby, hereby set forth that on or about the 21st day of April, 1904, the supreme court of the State of Idaho made and entered a final decision and judgment herein in favor of the defendant in error and against Charles Bown and Leander L. Ormsby, plaintiffs in error, in which final decision and judgment and the proceedings had prior thereto in said cause, certain errors were committed to the prejudice of said Charles Bown and L. L. Ormsby, plaintiffs in error, all of which will more in detail appear from the assignment of errors which is filed with this petition.

That the said supreme court of the State of Idaho is the highest court of the State of Idaho in which a decision in this action could be had.

Wherefore, Charles Bown and Leander L. Ormsby, plaintiffs in error, petition and pray for a writ of error from said decision and judgment to the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, Boise, Idaho, June 22, 1905.

JOHN RICE,
FRANK WYMAN, AND
W. E. BORAH,
Boise, Idaho, Attorneys for Plaintiff in Error.

42 STATE OF IDAHO, Supreme Court, } ss:

Let the writ of error issue upon the execution of a bond by the said Charles Bown and Leander L. Ormsby in the sum of $500.00, said bond when approved to act as a supersedeas.

Dated, June 22, 1905.

CHAS. O. STOCKSLAGER,
Chief Justice of the Supreme Court
of the State of Idaho.

43 In the Supreme Court of the State of Idaho.

CHARLES BOWN and LEANDER L. ORMSBY, Plaintiffs in Error, vs. ENOC C. WALLING, Defendant in Error. } Assignment of Errors.

Come now the above named plaintiffs in error and file their petition for a writ of error and say there are errors in the record and proceedings of the above entitled cause, and for the purpose of having the same reviewed in the Supreme Court of the United States, make the following assignment:

1. That the supreme court of the State of Idaho in its decision and judgment erred in affirming the judgment of the court below for the reason that the statutes of the State of Idaho upon which the cause of action herein is based, being sections 1210 and 1211 of the Revised Statutes of the State of Idaho, are each of them invalid and unconstitutional and in violation of article XIV of the amendments of the Constitution of the United States in that the said statutes do and each of them does deprive these plaintiffs in error of their property without due process of law.

2. That the supreme court of the State of Idaho in its decision and judgment in the above entitled cause erred in affirming the judgment of the court below for the reason that the statutes of the State of Idaho upon which the cause of action herein is based, be-

ing sections 1210 and 1211 of the Revised Statutes of the State of Idaho, are each of them invalid and unconstitutional and in violation of article XIV of the amendments of the Constitution of the United States in that said statutes do and each of them does deny these plaintiffs in error the equal protection of the law.

3. The supreme court of the State of Idaho erred in holding and deciding that said sections 1210 and 1211 do not abridge the
44 privileges and immunities of citizens or of these plaintiffs in error as guaranteed by the fourteenth amendment of the Federal Constitution.

4. That in deciding said cause and rendering said judgment there was drawn in question the Constitution of the United States and the same was necessarily involved in the decision, and the supreme court of the State of Idaho would not have rendered its decision nor given judgment without deciding the same against the clain and right under said Constitution specially set up by these plaintiffs in error.

5. The supreme court of the State of Idaho erred in holding and deciding that the defendant in error was entitled to recover as damages or as a penalty the value of the grasses growing upon the public domain within two miles of his dwelling house eaten and destroyed by the sheep of the plaintiffs in error and that thereby plaintiffs in error were not and are not deprived of property without due process of law or denied the equal protection of the law as provided by the Constitution of the United States.

6. The supreme court of the State of Idaho erred in holding and deciding that said sections 1210 and 1211 do not unlawfully discriminate between those engaged in grazing sheep on public domain and those engaged in grazing other stock on said public lands.

Wherefore, Charles L. Bown and Leander L. Ormsby, plaintiffs in error, pray that the judgment of said supreme court of the State of Idaho be reversed and said court be ordered to cause said action to be dismissed, and for such other relief as these plaintiffs in error may be entitled to, and for costs.

JOHN C. RICE,
FRANK W. WYMAN,
W. E. BORAH,
Attorneys for Plaintiffs in Error, Boise, Idaho.

Indorsed: Assignment of errors. Filed June 22, 1905. Sol Hasbrouck, clerk.

45 In the Supreme Court of the State of Idaho.

CHARLES BOWN and LEANDER L. ORMSBY, Plaintiffs in Error,
vs.
ENOS C. WALLING, Defendant in Error. } Bond.

Know all men by these presents, that we, Charles Brown and Leander L. Ormsby as principals, and James E. Clinton, Jr., and M. A. Reagan as sureties, are held and firmly bound unto Enos C. Walling in the sum of five hundred — ($500.00) to be paid to the said Enos C. Walling, to which payment well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this 22nd day of June, 1905.

Whereas, the above named plaintiffs in error seek to prosecute their writ of error to the Supreme Court of the United States to reverse the decision and judgment rendered in the above entitled action by the supreme court of the State of Idaho.

Now, therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute said writ of error to effect, and answer all costs and damages that may be adjudged if they shall fail to make good their plea, then this obligation to be void, otherwise to remain in full force and effect.

CHARLES BOWN,
LEANDER L. ORMSBY,
Principals.
JAMES E. CLINTON, JR.,
M. A. REAGAN,
Sureties.

[Endorsed:] Bond. Filed June 22, 1905. Sol Hasbrouck, clerk.

46 STATE OF IDAHO, } *ss*:
County of Ada, }

James E. Clinton, Jr., and M. A. Reagan being each duly sworn, depose and say: We are each of lawful age and are citizens of the State of Idaho, and know the contents of the foregoing instrument to which we have attached our names. We, each for himself say we are worth the sum of five hundred dollars over and above all debts, liabilities and exemptions.

(Signed) JAMES E. CLINTON, JR.
M. A. REGAN.

Subscribed and sworn to before me this 22 day of June, 1905.

[NOTARIAL SEAL.] JOHN J. BLAKE,
Notary Public.

The above bond is approved this 22 day of June, 1905.

CHARLES O. STOCKSLAGER,
Chief Justice of the Supreme
Court of the State of Idaho.

Endorsed: Bond. Filed June 22, 1905. Sol. Hasbrouck, clerk.

47 UNITED STATES OF AMERICA, ss:

The President of the United States to Enos C. Walling, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. within sixty days from the date hereof pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Idaho wherein Charles L. Bown and Leander L. Ormsby are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the chief justice of the supreme court of the State of Idaho this 22 day of June, 1905.

CHAS. O. STOCKSLAGER,
Chief Justice of the Supreme
Court of the State of Idaho.

Witness:
SOL. HASBROUCK,
Clerk of the Supreme Court.

48 BOISE, IDAHO, June 24, 1905.

The undersigned, attorneys for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

HAWLEY, PUCKETT & HAWLEY,
Attorneys, for Enos. C. Walling, of Record in the
Supreme Court of the State of Idaho.

49 BOISE, IDAHO, June 24, 1905.

The undersigned, defendant in error in the above entitled cause, hereby acknowledges due service of the above citation and enters an appearance in the Supreme Court of the United States.

ENOS C. WALLING.

50 In the Supreme Court of the State of Idaho.

CHARLES BOWN and LEANDER L. ORMSBY,
Plaintiffs in Error,
vs.
ENOS C. WALLING, Defendant in Error.
} Certificate of Clerk.

I, Sol Hasbrouck, clerk of the supreme court of the State of Idaho, do hereby certify the foregoing transcript to be a full, true and correct copy of the record and proceedings in the above and therein entitled cause as the same remains of record and on file in the office of the clerk of said court and that the same constitute the return to the annexed writ of error.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court this 14 day of July, A. D., 1905.

[Seal of Supreme Court, State of Idaho.]

SOL. HASBROUCK,
Clerk of the Supreme Court, State of Idaho.

Endorsed on cover: File No. 19,851. Idaho supreme court. Term No. 349. Charles Bown and Leander L. Ormsby, plaintiffs in error, *vs.* Enos C. Walling. Filed July 21st, 1905. File No. 19,851.